

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF PROTEST OF)	DECISION
)	
DEFENDER SERVICES, INC.)	
)	CASE NO. 2011-136
)	
MATERIALS MANAGEMENT OFFICE)	
IFB No. 5400003199)	POSTING DATE:
JANITORIAL SERVICES FOR)	SEPTEMBER 27, 2011
<u>MIDLANDS TECHNICAL COLLEGE</u>)	

This matter is before the Chief Procurement Officer (CPO)¹ pursuant to a request from Defender Services, Inc. (Defender), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review of an award made pursuant to an invitation for bids (IFB) to provide Janitorial Services to Midlands Technical College (MTC). The Materials Management Office (MMO) issued the IFB and made an award on MTC's behalf. Defender protests MMO's intent to award a contract to Global Industrial Services (Global). [A copy of Defender's protest is attached as Exhibit "A"].

On September 20, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPO conducted an administrative review by hearing. Appearing was Defender represented by Gary Whitaker, Jr., MMO represented by John Stevens, MTC represented by Rochelle P. Daniels, and Global represented by attorney W. Duvall Spruill. Present as witnesses were Jimmy Johnson with Defender, Richard Brinkley the MMO procurement officer for this IFB, and Wanda Honeycutt, a bid clerk with MMO. During the hearing, the parties submitted into evidence Exhibits 1 and 2. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Defender's letter of protest, sets forth two grounds of protest:

1. That Global's bid was not read out loud during the public bid opening; and
2. Global's bid was not submitted by the time set forth in the IFB for submitting bids.

¹ Pursuant to SC Code Ann § 11-35-840, the Chief Procurement Officer for Goods and Services delegated his authority to conduct an administrative review of this matter and to issue a decision to the Chief Procurement Officer for Construction.

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On July 12, 2011, MMO solicited bids for janitorial services on behalf of MTC. [Ex. 1, tab 1]
2. The IFB provided that bids were to be submitted on or before 11:00 AM on August 16, 2011. [Ex. 1, tabs 1 & 2]
3. The IFB allowed bidders to submit their bids either online or by hardcopy delivered to MMO's office. [Ex. 1, tabs 1 & 2]
4. By the deadline for receiving bids, MMO received 17 bids, one of which was rejected as nonresponsive. [Ex. 1, tabs 4² and 5, and Ex. 2] Both Defender and Global submitted a bid.
5. On August 29, 2011, MMO posted an Intent to Award, awarding the contract to Global. [Ex. 1 tab 6]
6. On September 7, 2011, Defender protested the award to Global. [Ex. A]

DISCUSSION

At issue in this protest is the conduct of the bid opening. The Consolidated Procurement Code (Code) and regulations of the Budget and Control Board adopted pursuant to the Code set forth requirements for the procurement officer or his/her designee to follow in the conduct of bid opening. The Code provides the following procedures for bid openings:

Bids must be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids and in the manner prescribed by regulation of the board. The amount of each bid, and other relevant information as may be specified by regulation, together with the name of each bidder, must be tabulated. The tabulation must be open to public inspection at that time. *S.C. Code Ann. § 11-35-1520(5)*.

The regulations provide the following additional procedures:

The procurement officer of the governmental body or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present. In the presence of one or more

state witnesses, he shall then personally and publicly open all bids received prior to that time, and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of each bid and such other relevant information, together with the name of each bidder, shall be tabulated and certified in writing as true and accurate by both the person opening the bids and the witness. The tabulation shall be open to public inspection.” *S.C. Code Reg. 19-445.2050(A)* (emphasis added).

Bidders were to submit their bids to MMO by 11:00 AM EST on August 16, 2011. Defender assumed in its letter of protest and opening argument that MMO received Global’s bid after the specified deadline. However, MMO presented uncontroverted evidence that MMO received an online bid from Global at 10:05:40 AM EST on August 16, 2011. Upon receipt of this evidence, Defender dropped its argument that MMO should have rejected Global’s bid as untimely. However, Defender continued to argue that MMO did not read Global’s bid aloud at the bid opening and therefore, MMO could not make an award to Global.

MMO conducted the bid opening starting at 11:00 AM on August 16, 2011. At the hearing, Mr. Johnson testified that he was present at the bid opening and took notes. Mr. Johnson testified that the State did not read aloud the name and bid prices of Global. Mr. Johnson’s notes do not contain any reference to Global. [Ex. 2] Ms. Honeycutt testified that she conducted the bid opening and was certain that she read aloud Global and its bid prices at the opening. Immediately after opening and reading bids, Ms. Honeycutt tabulated all bids received, including Global’s. [Ex. 1, tab 4] Mr. Brinkley was also present at the bid opening as the state witness; however, he could not specifically recall whether Ms. Honeycutt read Global’s bid aloud.

The South Carolina Procurement Review Panel (Panel) has established that the protestant has the burden of proof and must prove his case by a greater weight, or preponderance of the evidence. *Protest of Blue Bird Corp.*, Panel 1994-15 (finding the protestant failed to prove his claim by a preponderance of the evidence and his protest was properly denied); *Protest of First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11 (denying the protest because protestant did not prove its issue by a preponderance of the evidence). The CPO has two conflicting accounts from two credible witnesses regarding the reading of Global’s bid. Out of the limited documentary evidence submitted by the parties, only Mr. Johnson’s notes were prepared during the bid opening. Therefore, one might consider these notes to be the most accurate reflection of what

² Defender is listed twice on the bid tabulation found in Exhibit 1, tab 4. This is because Defender submitted its bid in both hardcopy form and online. The two bids are identical; therefore, in determining the number of actual bidders and bids, Defender is only counted once.

actually occurred at the bid opening and conclude that Defender met its burden of proof.³ However, even if one concludes Defender met its burden of proving MMO failed to read aloud Global's bid at the bid opening, this does not help Defender since such a technicality in the bid opening process does not warrant the State rejecting Global's bid.

While Regulation 19-445.2050(A) does require that bids be read aloud at bid opening, it is silent about what must be done if a bid is not read aloud. This situation is essentially addressed elsewhere in the regulations. Specifically, Regulation 19-445.2070(G) addresses the situation where a bid is received on time but is not opened and read at the bid opening. This regulation reads as follows:

Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening. [emphasis added]

Pursuant to this regulation, the Panel has found that the State had to consider a bid that it received at the specified location by the specified time even though the bid was overlooked and not read at the bid opening. *ML Clapp Construction Co.*, Panel Case 1987-9; *See also Protest of Technology Solutions*, Panel Case 1999-6 (noting that Reg 19-445.2070(H)⁴ allowed for acceptance of bids where a vendor was not named as an offeror at the opening but had submitted an offeror prior to the opening date and time).

Additionally, the United States Court of Federal Claims has held that whether a bid is timely or late is determined by when it is received at the designated office, not when it is discovered by the agency or when it is opened by the agency personnel. *California Marine Cleaning, Inc. v U.S.*, 42 Fed.Cl.281 (1998). More specifically, the Comptroller General of the United States has repeatedly held that the failure to read aloud all or part of a bid at the bid opening is merely a deviation as to form and does not preclude acceptance of the bid. *A.A. Beiro Construction Co., Inc.*, B-192664, Dec. 20, 1978, 78-2 CPD 425 (finding where bid was not read at the opening due to an initial determination that it was nonresponsive the failure to publicly read a bid is a deviation of form, not of substance, and does not affect the validity of an otherwise proper award); *Verner, Bernhard and McPherson (on behalf of Northwest Airlines, Inc.)*, B-178888, Oct. 26, 1973 (Comp.Gen.) (holding the inadvertent failure to read aloud an alternate bid at the bid opening was merely a procedural deficiency that had no prejudicial effect on the validity of the alternate bid); *Moir*

³ One could reasonably come to the contrary conclusion noting that these notes are not without defect. The date noted thereon for the date of the bid opening is wrong and the notation regarding the number of hard copy bids and number of online bids is wrong.

⁴ Amendments to Regulation 19-445.2070 in 2007 deleted former G, which related to unsigned bids, and rewrote and redesignated former H as G. The changes in the language did not change the effect of this regulation.

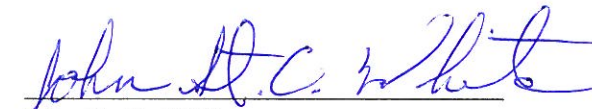
Ranch & Construction Co. & Muling Construction Co., Inc., B-191616, June 8, 1978, 78-1 CPD 423 (pointing out that “a failure to read all or part of a bid at bid opening is only a procedural defect which does not preclude acceptance of the bid”); *Leland and Melvin Hopp, Partners*, B-211128, Feb. 15, 1984, 84-1 CPD 204 (finding a bid that was timely received but misplaced by Army Corps of Engineers and not discovered until after bid opening was not a late bid and the acceptance of it in no way compromised the competitive system); *Pershield, Inc.*, B-256827, July 27, 1994, 94-2 CPD 46 (denying the protest and finding “we fail to see how the competitive system would be compromised by acceptance of a bid which was present at bid opening but mistakenly overlooked”).

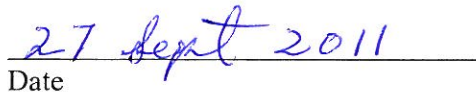
The CPO finds the above cases persuasive, particularly since our regulations contain a provision to prevent the rejection of a bid timely received before bid opening but mishandled by the State. Accordingly, to the extent that Defender proved the State did not read aloud Global’s bid at the opening, the CPO finds that it was merely a deviation of form and Global’s bid was timely and properly accepted by the State.

DETERMINATION

The uncontroverted evidence shows that Global delivered its bid to the location specified in the solicitation by the time specified. Therefore, MMO’s was required by applicable regulation, law, and Panel precedent to consider and accept Global’s timely bid, even if MMO failed to read Global’s bid aloud at the bid opening.

For the forgoing reasons, the protest is denied.


John St. C. White
Chief Procurement Officer
For Construction


Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2011)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



September 7, 2011

To: Chief Procurement Officer
Materials Management Office

Solicitation: 5400003199
Description: Janitorial Services for Midlands Tec.
Agency: Midlands Technical College

Defender Services, Inc. a registered and licensed company in the state of South Carolina would like to file a protest of the Intent to Award bid number 5400003199 dated August 29, 2011.

The protest is filed for the following reasons:

1. Three companies were represented at the bid opening: (John Sullivan – Allegiance, Jimmy Johnson – Defender Services, Inc. and Joe Hudson – Budd Group)
The cost for the (5) five categories were read for sixteen companies in which cost for Global Industrial Services were not read to the group.
2. Defender Services, Inc. would like to protest the intent to award based on Global Industrial Services not meeting the deadline requirements for the submission of their bid.

We appreciate the opportunity to express our concern for this matter and look forward to your response.

Thank you,

A handwritten signature in dark ink, appearing to read "Chip Whitaker", is written over a horizontal line.

Chip Whitaker
Regional Vice President
Defender Services, Inc.